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Certainty of Amount or Extent of Damage-Loss of Profits

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DAMAGES—CERTAINTY OF AMOUNT OR EXTENT OF DAMAGE—LOSS OF PROFITS.

—Defendant, an established trucker, sold his equipment and good will to plaintiff, an established competitor, and promised to assist him in retaining defendant's former customers and employees. The court, finding that defendant had broken his promise of assistance, awarded damages for lost profits on evidence introduced showing the amount of defendant's business before and after the transfer. The appeal alleged the damages were remote, speculative, and conjectural. Held, Affirmed: If it is certain that there was damage, the amount need not be proved with mathematical certainty, but it is sufficient if there is evidence which will enable the court or jury to make a fair and reasonable approximation. *Hedrick et al. v. Perry* (C. C. A. 10, 1939), 102 F. (2d) 802.

Originally, loss of profits was never an element of recoverable damage either in actions of tort¹ or contract.² This complete restriction has been gradually eliminated. As early as 1845 a celebrated case allowed "profits" when they were the direct result of the wrongful act.³ It is now repeatedly asserted, beginning as early as 1858, that they may be recovered even when they are consequential; i. e., based upon collateral transactions.⁴ However, recovery for alleged loss of profits is often denied.

Courts have advanced standards of certainty to which a claim for this damage must conform.⁵ It seems, however, that less stringent rules are applied when the alleged loss is the direct result of the wrong. In such cases, if a loss of some profit is proved with reasonable certainty, the amount may be submitted to the jury on the best evidence which is available.⁶

In regard to consequential damage as distinguished from direct, there is confusion in the decisions but a definite trend toward liberality is apparent. The first decisions required that both the fact of some damage and its amount be certain.⁷ Later decisions have modified this to reasonable certainty.⁸

¹ The requirement of certainty of lost profits is the same in both contract and tort actions. See note (1933), 46 Harv. L. Rev. 696.

² *The Anna Maria* (1817), 15 U. S. (2 Wheat.) 327; *The Amiable Nancy* (1818), 16 U. S. (3 Wheat.) 546, 4 L. Ed. 256; *Boyd v. Brown* (1835), 17 Pick. (Mass.) 453.

³ *Masterton v. Mayor, etc. of City of Brooklyn* (1845), 7 Hill 61, 42 Am. Dec. 38.

⁴ *Griffin v. Colver* (1858), 16 N. Y. 489, 69 Am. Dec. 713, admitting that consequential damage can be recovered if it is certain. Occasionally, rental value of property or interest on investment is allowed in lieu of damages for loss of profit.

Paola Gas Co. v. Paola Glass Co. (1896), 56 Kan. 614, 44 Pac. 621.

⁵ Although the doctrine of certainty is occasionally used to test the sufficiency of proof of claims for future consequences of personal injury or to claims for direct physical loss or injury, its principal use is in the field of commercial profits. *McCormick, Damages* (1935), Sec. 28. It is an anomaly in damage law, used chiefly in American courts.

⁶ *Bagley v. Smith* (1853), 10 N. Y. 489; *Dennis v. Maxfield* (1865), 92 Mass. 138; *Shoemaker v. Ackler* (1897), 116 Cal. 239, 48 Pac. 62; *Rule v. McGregor* (1902), 117 Iowa 419, 90 N. W. 811.

⁷ *Griffin v. Colver* (1858), 16 N. Y. 489, 69 Am. Dec. 713; *Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co.* (1906), 141 N. C. 284, 53 S. E. 885.

⁸ *Belcher v. Bullion* (Tex. Civ. App. 1938), 121 S. W. (2d) 483; *Steitz v. Gifford* (1939), 280 N. Y. 15, 19 N. E. (2d) 661; *Restatement, Contracts* (1932), § 331.

A number of modern decisions have stated that the requirement of certainty applies only to the fact of some damage and not to its amount.⁹ However, many courts, purporting to apply this standard, actually do require a degree of certainty of amount. The prevailing view still is that the amount must be reasonably certain.¹⁰ Some courts have gone further in applying the above rule and held that the amount can be measured by sufficient evidence to enable the jury to make a fair and reasonable approximation¹¹ or even with the best evidence which is available under the circumstances.¹²

Indiana decisions demonstrate remarkable consistency. Originally, loss of profits probably was not considered an element of recoverable damage.¹³ The court subsequently adopted and has since retained a rule of "reasonable certainty", making no distinction between the fact of some loss and its amount, and requiring a criterion by which damages can be measured.¹⁵

But regardless of the rule applied and, to some extent, regardless of the evidence submitted to measure the loss,¹⁶ where an established business has been destroyed or interrupted, the courts are lenient.¹⁷ Where a new business has been destroyed, the courts deny recovery.¹⁸ Where an agency contract has been broken, the courts with few exceptions allow recovery if the agency is exclusive and deny it if it is not.¹⁹

⁹ *Story Parchment Co. v. Paterson Parchment Paper Co.* (1931), 282 U. S. 555, 51 Sup. Ct. 248, 75 L. Ed. 544; *Thayer-Moore Brokerage Co. v. Campbell* (1912), 164 Mo. App. 8, 147 S. W. 545; *Hacker Pipe and Supply Co. v. Chipman Valve Mfg. Co.* (1936), 17 Cal. App. (2d) 265, 61 Pac. (2d) 944; *Nichols v. Anderson* (1939), 43 N. M. 296, 92 P. (2d) 781; *Oliver v. Autographic Register Co.* (1939), 126 N. J. Eq. 18, 7 Atl. (2d) 797.

¹⁰ *City of Corning v. Iowa-Nebraska Light and Power Co.* (Iowa 1938), 282 N. W. 791.

¹¹ *Story Parchment Co. v. Paterson Parchment Paper Co.* (1931), 282 U. S. 555, 51 Sup. Ct. 248, 75 L. Ed. 544; *City of Kennett v. Katz Construction Co.* (1918), 273 Mo. 279, 202 S. W. 558; *Hacker Pipe and Supply Co. v. Chipman Valve Mfg. Co.* (1936), 17 Cal. App. (2d) 265, 61 Pac. (2d) 944.

¹² *Thayer-Moore Brokerage Co. v. Campbell* (1912), 164 Mo. App. 8, 147 S. W. 545; *Firestone Tire and Rubber Co. v. Sheets* (1936), 178 Okla. 191, 62 Pac. (2d) 91.

¹³ *Porter v. Allen* (1856), 8 Ind. 1.

¹⁴ *Aetna Life Ins. Co. v. Nexsen* (1882), 84 Ind. 347; *Connersville Wagon Co. v. McFarlan Carriage Co.* (1905), 166 Ind. 123, 76 N. E. 294; *Doddridge v. American Trust and Savings Bank* (1934), 98 Ind. App. 334, 189 N. E. 165.

¹⁵ *Montgomery Co. Union Agr. Soc. v. Harwood* (1891), 126 Ind. 440, 26 N. E. 182; *Cleveland, C., C. and St. L. Ry. Co. v. Woodbury Glass Co* (1918), 80 Ind. App. 298, 120 N. E. 426.

¹⁶ *Ralph S. Bauer, The Degree of Moral Fault as Affecting Defendant's Liability* (1933), 81 U. Pa. L. Rev. 586.

¹⁷ *City of Terre Haute v. Hudnut* (1887), 112 Ind. 542, 13 N. E. 686; *Cleveland, C., C. and St. L. Ry. Co. v. Woodbury Glass Co.* (1918), 80 Ind. App. 298, 120 N. E. 426; *Belcher v. Bullion* (Tex. Civ. App. 1938), 121 S. W. (2d) 483. But see: *Connersville Wagon Co. v. McFarland Carriage Co.* (1905), 166 Ind. 123, 76 N. E. 294.

¹⁸ *Western Gravel Road Co. v. Cox* (1872), 39 Ind. 260; *Montgomery Co. Union Agr. Soc. v. Harwood* (1890), 126 Ind. 440, 26 N. E. 182; *Paola Gas Co. v. Paola Glass Co.* (1896), 56 Kan. 614, 44 Pac. 621; *Texas Power and Light Co. v. Roberts* (Tex. Civ. App. 1916), 137 S. W. 225; *American Oil Co. v. Lovelace* (1928), 150 Va. 624, 143 S. E. 293. Contra: *Story Parchment Co. v. Paterson Parchment Paper Co.* (1931), 282 U. S. 555, 51 Sup. Ct. 248, 75 L. Ed. 544.

¹⁹ *McGinnis v. Studebaker Corp. of Am.* (1915), 75 Oreg. 519, 146 Pac. 825, denied recovery in non-exclusive agency. *Hirchhorn v. Bradley* (1902),

The tendency of the courts to refuse recovery when a new business is destroyed seems to have caused them to refuse recovery where a business opening has been delayed.²⁰ If the litigation occurs subsequent to the delayed opening, it appears that operating data would form a sufficiently certain measure of the loss.²¹

In those cases where the alleged loss is due to the prevention of one transaction as contrasted with the situation where a series of transactions is involved, the majority view allows the whole profit if it is reasonably certain that the plaintiff would have obtained it.²² A minority of American jurisdictions have followed the English view and allow the claimant the value of his chance, to be determined by the jury.²³

Originally, a criterion for measurement was required for the recovery of both direct and consequential losses. Fact situations involving a claim for direct loss, just as they had been the first in which any recovery was allowed, were the first in which the measurement of the damage was left to the discretion of the jury. Recent decisions show greater leniency in the case of consequential loss, even within the same jurisdiction.²⁴ It is submitted that the principal case, requiring evidence only for a reasonable approximation of the amount of the consequential loss, is a step toward a desirable and logical view.

V. R. B.

DAMAGES—MENTAL SUFFERING.—Plaintiff, who was recovering from serious illness, suffered a relapse when the defendant collection agency, knowing his condition and intending to induce payment of a debt by intimidation, sent letters threatening suit, attachment, garnishment, and the future credit standing of the plaintiff. Held: Plaintiff may recover for physical injuries resulting from mental suffering intentionally caused by the defendant. *Clark v. Associated Retail Credit Men* (C. C. A. D. C., 1939), 105 F. (2d) 62.

Recovery for mental suffering is universally permitted when an individual intentionally acts in such a way as to place another person in apprehension of bodily harm or an offensive touching.¹ Recovery is generally allowed when an individual acts, intentionally or negligently, in such a way as to cause a mental condition which influences another person to react toward his physical surroundings in such a manner as to sustain physical injury,² or to cause

117 Iowa 130, 90 N. W. 592; *Wakeman v. Wheeler and Wilson Mfg. Co.* (1886), 101 N. Y. 205, 4 N. E. 264; *United States Auto Co. v. Arkadelphia Milling Co.* (1919), 140 Ark. 73, 215 S. W. 641; *Long Beach Drug Co. v. United Drug Co.* (Cal. 1939), 89 Pac. (2d) 386, allowed recovery when exclusive agency contract was broken. Contra: *Stephany v. Hunt Bros. Co.* (1923), 62 Cal. App. 638, 217 Pac. 797.

²⁰ *Western Gravel Road Co. v. Cox* (1872), 39 Ind. 260.

²¹ Note (1933), 46 Harv. L. Rev. 696.

²² *Barker v. Western Union Telegraph Co.* (1908), 134 Wis. 147, 114 N. W. 439; *Phillips v. Pantoges Theater Co.* (1931), 163 Wash. 303, 300 Pac. 1048.

²³ *Chaplin v. Hicks* (1911), 2 K. B. 786; *Wachtel v. National Alfalfa Journal Co.* (1920), 190 Iowa 1293, 176 N. W. 801; *Kansas City, Mex., and Orient Railroad Co. v. Beel* (Tex. Civ. App. 1917), 197 S. W. 322.

²⁴ As an example, the rule in New York has changed from certainty, *Griffin v. Colver* (1858), 16 N. Y. 489, 69 Am. Dec. 718, to reasonable certainty, *Steitz v. Gifford* (1939), 280 N. Y. 15, 19 N. E. (2d) 661.

¹ Note (1923), 23 A. L. R. 361, 389.

² *Woolery v. Louisville, N. A. & C. Ry. Co.* (1886), 107 Ind. 381, 8 N. E. 226; Restatement, Torts (1934), Sec. 443, 444.